

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB FEB. 11, 00  
U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Stiefel Laboratories, Inc.

v.

VetGen, L.L.C.

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Cancellation No. 27,360

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Robert M. Kunstadt and Lydia T. Gobena of R. Kunstadt, P.C.  
for Stiefel Laboratories, Inc.

Lisabeth H. Coakley and David A. McClaughry of Harness,  
Dickey & Pierce, P.L.C. for VetGen L.L.C.

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Before Seeherman, Hanak and Rogers, Administrative Trademark  
Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Stiefel Laboratories, Inc. has petitioned to cancel the  
registration of VetGen, L.L.C. for the trademark VETGEN for  
"veterinary molecular biology services, namely advanced  
genetic molecular disease detection and DNA profiling  
services."<sup>1</sup> As grounds for cancellation, petitioner has

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<sup>1</sup> Registration No. 2,052,275, issued April 15, 1997.

alleged that prior to the date of first use claimed by respondent, petitioner has used the mark VETGENIX to identify animal health products, and filed an application for that mark for various products for animals, including health preparations; and that respondent's mark VETGEN so resembles petitioner's mark VETGENIX, as to be likely, when applied to respondent's goods, to cause confusion and mistake and to deceive.

In its answer respondent denied the essential allegations in the petition for cancellation.<sup>2</sup>

The parties are primarily in agreement about the material which is in the record, as shown by their identical recitation of the record in their briefs. (See pp. 1, 2 of petitioner's main brief, p. 2 of respondent's brief.) Accordingly, we will deem them to have stipulated to all the material so identified, including material which normally could not be made of record by a notice of reliance. We also note that the parties have stipulated that the testimony of witnesses could be submitted by declaration, Trademark Rule 2.123(b), and the testimony of opposer's president, Lou Shaban, and of applicant's witnesses, namely its president, John Duffendack; a veterinarian and president

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<sup>2</sup> Respondent also included a laundry list of what it styled as affirmative and special defenses, most of which are not defenses at all, but merely allegations as to why it believes confusion is not likely. As for the properly pleaded affirmative defenses,

of a transgenetic research company, William MacArthur; and the president of a company trading as Webcheck, Joseph Ryndak, was taken in this manner. Petitioner has, in its brief, objected to certain of the testimony and exhibits submitted by respondent, and respondent has objected to certain of the testimony submitted by petitioner. We will refrain from a long discussion of these objections, but simply rule on them.

The objection with respect to the third-party registrations submitted by respondent is overruled. Such registrations can be used to show the suggestiveness of the elements shown in those marks, and are therefore relevant on the issue of the strength of petitioner's mark. Petitioner is correct, however, that the registrations do not establish use of the marks listed therein; further, to the extent that the submissions do not indicate the goods or services covered by the registrations, they are of limited probative value. Petitioner's objections relating to third-party registrations for marks containing the elements VET or GEN;<sup>3</sup> third-party registrations for BIO- or -MEDIX formative

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respondent has not referred to them in its trial brief, and we therefore deem them to have been waived.

<sup>3</sup> Although these registrations are relevant in that third-party registrations may be used to show the suggestiveness or descriptiveness of a particular element, and therefore have a bearing on the strength of petitioner's mark, petitioner is correct that the registrations do not establish use of the marks listed therein. Further, to the extent that the submissions do not indicate the goods or services covered by the registrations, they are of limited probative value.

marks; and the exhibits relating to Mr. Duffendack's "Dogpile" search are overruled. Petitioner's hearsay objection to Mr. Duffendack's testimony regarding his conversation with the manager of Burns is sustained. Petitioner has objected to Exhibits 14(b) and 14(d-f) on the basis that these documents were not produced in response to petitioner's document request No. 1. Respondent has not responded to this objection and, because it appears to be well taken, those exhibits will not be considered. However, petitioner's motion to exclude that part of Mr. Duffendack's declaration relating to its canine testing services is denied. It is obvious from the documents which respondent did produce in discovery, and which have been made of record by petitioner in its notice of reliance, that respondent provided information that it was involved in canine testing.

With respect to respondent's motion to strike Exhibits P, S and T to the Shaban testimony declaration, the motion is granted in regard to Exhibits S and T, which reflect telephone calls taken by someone other than the witness, and are therefore hearsay. Petitioner's alternative argument, in its reply brief, to assert that these exhibits fall within the business records exception, is not persuasive. These memoranda are clearly not orders, and petitioner has made no showing that such memoranda are kept in the regular course of business. Exhibit P, however, represents a note

from the witness, and respondent's motion to exclude this document as hearsay is therefore denied.

The case has been fully briefed,<sup>4</sup> but an oral hearing was not requested.

Petitioner's wholly owned subsidiary, Vetgenix, was incorporated on April 28, 1994. It produces products in the area of equine dermatology—in fact, it has described itself as "the first company dedicated exclusively to equine dermatology." [www.equinevetnet.com](http://www.equinevetnet.com), Shaban declaration, Exhibit B. It currently markets products for skin, coat and hoof care for horses, including antimicrobial shampoo for horses, moisturizing skin and coat cleanser, sensitive skin shampoo, pre-moistened hoof treatment pads, antipruritic lotion and topical antifungal solution concentrate for horses. Petitioner intends to expand its business to other veterinary supplies, although the products which are planned or are in development appear to be for topical application to animals, and none are in the field of veterinary DNA testing.

Petitioner filed an intent-to-use application to register VetGenix (we use this format to reflect the special

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<sup>4</sup> The parties' stipulation to reopen the testimony period of respondent, and extend the rebuttal testimony period and briefing dates is granted.

It is noted that throughout its briefs petitioner has cited cases which are "unpublished." Only cases which have been marked by the Board as "citable as precedent" may be used for that purpose. See **General Mills Inc. v. Health Valley Foods**, 24 USPQ2d 1270 (TTAB 1992).

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form shown in the resulting registration) on June 16, 1994, and a registration for this mark issued on December 1, 1998 for the following goods:<sup>5</sup>

Non-medicated hair and coat shampoo and conditioner; lotions for pets and livestock, and non-medicated hoove conditioner, in Class 3;

Medicated dermatological animal health preparations, namely, shampoos, lotions, creams, and wound dressings for pets and livestock; anti-inflammatory, anti-infective, antiseptic and disinfectant preparations for veterinary use; insect repellent for pets and livestock and preparations for treatment of hoof diseases, in Class 5

Petitioner, through VetGenix Ltd.,<sup>6</sup> used the mark on goods in Class 5 as of July 17, 1995, and on goods in Class 3 as of September 30, 1996. The record shows that petitioner uses the mark as a house mark.

Petitioner's sales and marketing figures were filed under seal, so we will not disclose them in this opinion. Suffice it to say that the sales figures from April 95 through December 98 are relatively low, and do not demonstrate that VetGenix is a strong mark.

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<sup>5</sup> Petitioner pleaded ownership of the application in its petition for cancellation. Because the registration issued after the filing of the petition, and petitioner made it of record as part of its trial testimony, we deem the pleadings to be amended to include the registration.

<sup>6</sup> Because VetGenix Ltd. is the actual user of petitioner's mark, hereafter, unless otherwise specifically noted, our references to petitioner will encompass VetGenix Ltd.

Petitioner's marketing expenditures are far higher than its sales figures, but petitioner has not provided information breaking down these expenses as to the manner in which the money was spent. In this connection, we note that a substantial amount of the marketing expenses listed in Exhibit 3 to the Shaban declaration occurred in the two years prior to its first use of the VetGenix mark.

According to Mr. Shaban's declaration, the VetGenix company "has been promoted in trade directories, magazines, direct mailings, on the Internet and at trade shows." ¶ 13. The direct mail pieces of record reflect the use of VetGenix Ltd. as a trade name, although one mailing shows product on which VetGenix appears as a house mark.<sup>7</sup> Advertisements for petitioner's various VetGenix products have appeared in "Thoroughbred Times," "Equus," "Equine Practice," "The Horse," and "Supplement to DYM Newsmagazine," and its products were mentioned in "Horse Journal" in a large list reviewing various medicated shampoos. Petitioner also attends trade shows, including the American Association of Equine Practitioners, AVDA and AAVD, and veterinary products distributor meetings, and has sponsored awards at horse shows. Information about petitioner is also available through the Internet, i.e., an AltaVista search retrieved the following listing:

VetGenix Ltd., Dermatological treatments  
for horses  
Our goal is to be the company most  
responsive to the product needs of the  
equine veterinarian in developing  
innovative solutions to problems of the  
[sic] horses  
URL: [www.vetgenix.com/](http://www.vetgenix.com/)

Petitioner markets its goods to doctors of veterinary medicine, animal owners and breeders and others interested in animal health, and its goods are sold through wholesale distributors of animal health products and veterinary trade shows. The retail prices for petitioner's goods range from \$15 to \$25.

Respondent was formed on October 3, 1995 by a group of molecular geneticists from Michigan State University and the University of Michigan. Respondent's veterinary molecular biology services provide for the testing of a purebred animal's DNA to classify its status with respect to various inherited genetic diseases. Respondent's services also include parentage verification, DNA fingerprinting and DNA storage. In particular, respondent can determine whether an animal is clear of a negative gene, is a carrier, or whether the animal has two of the negative genes, and thus will have the disease caused by the gene. Most of respondent's testing services are used for dogs, but 5% is involved with the testing of Arabian horses (of which there are 12,000

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<sup>7</sup> The exhibit showing the distribution numbers of each direct mail piece is confidential.

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registered in the United States) for Severe Combined Immunodeficiency Syndrome, or SCIDS.

Respondent began using VETGEN as a service mark on October 7, 1995. The mark was chosen because it was a contraction of the words "veterinary" and "genetics." Respondent filed an application for federal registration on February 1, 1996, and its registration issued on April 15, 1997. The services offered under the VETGEN mark are primarily marketed and sold directly to purebred animal owners and breeders and veterinarians. About 10% of respondent's business involves sales through its distributor, The Butler Company, which is a veterinary supply company.

When a customer, or Butler on behalf of a customer, requests respondent's services, respondent sends a sample collection kit directly to the veterinarian or breeder/owner, who then takes a blood sample or collects epithelial cells from the inside of the animal's mouth. The specimen is then returned to respondent, which determines whether the animal is a carrier of or affected by the genetic disease for which the animal is being tested. The results are reported only to the purchaser of the services, not to Butler. The customer must be reasonably educated about molecular genetic diseases in order to understand the

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test result. Respondent's services generally cost from \$150 to \$180 for individual tests.

From the time of its first use of VETGEN in October 1995 until June 1998, respondent's revenues from its services have amounted to about \$500,000.

Respondent does much of its marketing through the Internet. It has also advertised its test for SCIDS in Arabian horses in "Arabian Horse World" and "Pacific and Southwest Arabian" magazines. Articles about respondent's testing service for Arabian horses have also appeared in "Arabian Horse World," "Equus" and "Arabian News."

Turning first to the question of priority, we note that in a cancellation proceeding, where obviously the respondent owns a registration, "a petitioner, whether a registrant or not, must, in the first instance, establish prior rights in the same or similar mark and the respondent in turn can defeat the petitioner's claim of damage by establishing that, as between the parties, it possesses superior rights in the mark sought to be cancelled." **Brewski Beer Co. v. Brewski Brothers Inc.**, 47 USPQ2d 1281 (TTAB 1998). In this case, petitioner may rely on the filing date of its intent-to-use application, which became its constructive use date upon the issuance of its registration. That date, June 16, 1994, is prior to respondent's first use date of October 7, 1995. Thus, although petitioner did not begin actual use of

its mark on its Class 3 goods until September 30, 1996, almost a year after respondent's first use, it has priority by virtue of the constructive use conferred upon intent-to-use applications when registrations issue. Moreover, petitioner made actual use of its mark on its Class 5 goods on July 17, 1995, three months earlier than respondent's first use.

This brings us to the issue of likelihood of confusion. Our determination is based on an analysis of all of the probative facts in evidence that are relevant to the factors regarding likelihood of confusion, as set forth in **In re E.I. du Pont de Nemours & Co.**, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973)

Turning first to the parties' goods and services, petitioner's goods and respondent's services are very different. Petitioner's goods are essentially dermatological products and products for topical application to animals, while respondent provides genetic testing laboratory services.<sup>8</sup> The only similarity between the goods and services is that they involve animals, but the fact that a term, e.g., veterinary, can be found to generally describe both is not a sufficient basis upon which to find that the

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<sup>8</sup> Petitioner's products are, in fact, used only for horses, but because its identification of goods is not so limited with respect to all of the items, in making our determination we have considered the goods (with the exception of those for treatment of hoof diseases) to be used for all pets and livestock.

goods and services are related. See **General Electric Company v. Graham Magnetics Incorporated**, 197 USPQ 690 (TTAB 1977). Here, there is no showing that goods such as petitioner's and the services identified in respondent's registration emanate from the same source. The goods on which petitioner is currently using its mark, and those which it is contemplating expanding to, are in no way similar to respondent's identified services. Nor has petitioner shown that any third parties provide both animal dermatological and topical products, and DNA testing services, such that the relevant consumers might assume a connection between the goods and services if they were offered under similar marks.

We recognize that the consumers for both petitioner's products and respondent's services can be the same. However, these common consumers—veterinarians and breeders—must be considered sophisticated or knowledgeable about such goods and services.<sup>9</sup> They are not likely to believe that products and services of the type offered by petitioner and respondent—products and services which are so different in

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<sup>9</sup> We note that respondent has described its customers as including owners of pure bred animals. However, it is obvious from the nature of the service that respondent's customers are not pet owners generally, i.e., they would not include all members of the general public who own pure bred dogs, as opposed to mutts. Because the purpose of the laboratory services is to test for genetic defects for breeding purposes, the pure bred animal owners would be those using their animals for breeding.

nature--emanate from the same source merely on the basis of the marks involved herein.

Petitioner asserts that the parties' goods and services are sold through the same channels of trade, but a closer reading of its brief reveals that it is referring to media in which the goods are advertised, rather than sold. With respect to channels through which the goods are sold, the record shows that respondent's services are obtained by ordering a specimen kit directly by the breeder or veterinarian, or by ordering a specimen kit from its distributor. Respondent then sends the specimen kit directly to the customer, which sends the specimen to respondent, and the customer receives the test results directly from respondent. Respondent's testing services and specimen kit are not available through pet stores or other retail venues where the goods identified in petitioner's registration could be sold. Nor has petitioner shown that services such as respondent's would be sold in any retail venues.

The only common channel of trade is that the services and goods can be sold by veterinary products distributors, and indeed, in this case both are sold by the same distributor, namely Butler. However, because only knowledgeable people would purchase from a veterinary products distributor, again they are not likely to believe

that products and services of the type offered by petitioner and respondent emanate from the same source merely on the basis of the marks involved herein.

Turning then to the marks, they are certainly similar in appearance, since VetGenix is VETGEN with the addition of the letters "IX." This visual similarity is more pronounced because respondent's name is generally depicted as VetGen, i.e., with the same "capital V, capital G" depiction as VetGenix. However, respondent's services, and the specimen kits by which those services are obtained, are not services or items which would be found in retail outlets, such as pet stores.

The marks differ in sound, since the "IX" ending on petitioner's mark gives it a three-syllable pronunciation, while respondent's mark is only two syllables. We are not persuaded by petitioner's argument that the marks sound alike because "when VETGENIX is spoken people may hear 'VETGEN is' or 'VETGEN's,'" or that "when 'VETGEN is' or 'VETGEN's' is spoken, people may hear VETGENIX. Brief, p. 16. Because of common English usage, if either mark were used in a sentence, the words following the mark, would make it clear whether the term at issue was "VETGEN is" or VetGenix.

As for connotation, consumers of respondent's services would recognize that VETGEN suggests "veterinary genetics,"

as was respondent's intention. VetGenix, as used for petitioner's products, does not have a similar connotation. Although the element VET obviously refers to "vet" or "veterinary," the GENIX portion of the mark would not suggest "genetics" to purchasers of the goods since they have nothing to do with genetics. GENIX is a variant spelling of "genics," and "genic" is a suffix meaning, inter alia, "producing or causing," "produced or caused by" and "pertaining to suitability for reproduction by a medium." The Random House Dictionary of the English Language, 2d ed. unabridged, © 1983. It is not clear what meaning this element may have in the context of the mark VetGenix, but we do note that VETERINARY SYNERGENICS has been registered by a third party for veterinary and medical services. What is clear is that the connotations of the marks are different.

As noted previously, the only overlapping consumers of the parties' goods and services are sophisticated and/or knowledgeable purchasers. Moreover, although respondent's services are not extremely expensive, the upper range for the tests being \$150 to \$180, there are major financial considerations in choosing the services, since breeders want to avoid a reputation that the dogs or horses they sell have hereditary diseases. The results of genetic testing may also determine whether the owner of a horse wants to breed his horse to another. Because of the financial impact

involved in breeding animals, consumers will be careful in choosing the laboratory which handles the DNA testing. Moreover, Mr. MacArthur, a veterinarian, testified that he was aware of a number of marks for veterinary products which look and sound similar, and is accustomed to recognizing distinctions between marks, and that even the slightest distinctions can be significant.

For the foregoing reasons, we find that the consumers for the respective goods and services will be able to distinguish between the marks.

We would also point out that petitioner's mark is not a strong mark. It has been used for a limited period of time, and the sales and promotional figures are relatively small, such that we find the mark has not achieved any fame. Further, the initial portion of the mark, VET, is descriptive of the goods, since it is an abbreviation for "veterinarian" or "veterinary." The Random House Dictionary of the English Language, 2d ed. unabridged, © 1983. We also note that there are many VET-component marks which have been registered by third parties for various animal health care products and services. Third party registrations, although not evidence of use of the marks shown therein, may be considered as tending to show that a registered mark may be a "weak" mark, thus resulting in narrowing an opposer's rights therein, or to indicate the meaning of conflicting

portions of marks in the same way as dictionaries. See **Conde Nast Publications Inc. v. Miss Quality, Inc.**, 180 USPQ 149 (TTAB 1973), aff'd 507 F.2d 1404, 184 USPQ 422 (CCPA 1975). Further, as noted above, the GENIX portion of the mark is a spelling variation of the suffix "genic/s." We cannot consider VetGenix to be a truly invented word, in the manner of KODAK, without any significance relating to petitioner's goods. Accordingly, we find that the knowledgeable consumers of the parties' products and services would not assume that the use of the parties' respective marks on their products and services indicate that the products and services come from the same source.

For the same reasons, the fact that the parties' goods and services may be advertised or mentioned in the same horse oriented trade journals and equestrian magazines, such as "Equus," is not a sufficient basis for us to find likelihood of confusion. The sophisticated consumers who would read specialized periodicals devoted to animals would not, without more than the fact that there is a similarity between the marks VetGenix and VETGEN, assume that all products and services dealing with horses, or with other animals for which genetic testing is done, come from the same source.

Petitioner also points out that both parties have Internet web sites which are used to promote their products

and services,<sup>10</sup> and that they are accessed, in the case of petitioner, by [www.vetgenix.com](http://www.vetgenix.com) and, in the case of respondent, by [www.vetgen.com](http://www.vetgen.com). Petitioner raises the concern that consumers attempting to access petitioner's website may shorten its mark, and thereby instead reach respondent's.

The issue before us is whether respondent's use of VETGEN for its identified advanced genetic molecular disease detection and DNA profiling services is likely to cause confusion with petitioner's mark VetGenix for the various animal products identified in its registration, not whether the parties' website addresses might lead to confusion. In any event, petitioner's concerns seem to us to be highly speculative. There is nothing in this record to suggest that users of the Internet routinely shorten names or trademarks in seeking a company's website. Given the fact that the Internet can carry a virtually infinite number of websites, those using the Internet to access websites are unlikely to shorten company names. Moreover, respondent has shown that searches of the Internet for its trademark VETGEN, by various search engines, do not retrieve any references to petitioner and its VetGenix mark, and vice

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<sup>10</sup> Petitioner refers to the Internet as being a common channel of trade. However, petitioner explains this comment, in its reply brief at p. 9, as meaning that the parties' web sites offer information about their goods and services. It does not appear

versa. Even if we were to accept petitioner's allegation that a consumer might log on to one party's web site by mistake, that mistake would be quickly recognized because petitioner's dermatology products would not be found on respondent's web site, and respondent's genetic testing services would not be shown on petitioner's web site.

Petitioner also asserts that the parties promote their respective goods and services at the same trade shows. However, the record does not support this claim. The fact that respondent's president went, for a few hours, to a particular trade show at which petitioner exhibited, for the purpose of hearing a technical presentation given by a university professor, does not show that petitioner and respondent exhibit at the same trade shows, or that the consuming public would encounter their exhibits at such shows. In fact, respondent's evidence is that it has not exhibited at any of the trade shows at which petitioner has exhibited. Respondent's evidence is not belied by the fact that respondent has incurred expenditures for trade show promotion; the inference is that respondent has exhibited at different trade shows from petitioner's.

Finally, we turn to an examination of the evidence of "actual confusion" which petitioner has submitted. Because the evidence has been submitted with the testimony of Mr.

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from the record that the parties actually sell their goods or

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Shaban, the statements and/or material he has testified about can be considered only for the fact that the statements were made or documents were received.

Exhibit M is a typed purchase order sent to petitioner for one of petitioner's products. The description of the product is given as "VET-GEN CYTOXYL AD TOPICAL GEL." The order does not show that the purchaser was confused as to the source of petitioner's product; on the contrary, the purchaser sent the order to the correct party, petitioner. There could be many reasons why VETGEN rather than VETGENIX appears on the order,<sup>11</sup> and we cannot conclude simply by this shortening of VETGENIX that this order represents a situation of actual confusion.

Exhibits N and O are identical form mailings from a company called Webcheck, attempting to sell "Dear Website Owner" a website improvement. Both of these mailings were sent to petitioner's address, but one identified the recipient as "VETGEN" and the other as "VETGENIX." Petitioner's receipt of a mailing addressed to "VETGEN" is not evidence of consumer confusion, since the Webcheck company is not a customer of animal or veterinary items. Moreover, respondent has submitted a declaration from the

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services through the Internet.

<sup>11</sup> Respondent attempted, through the testimony of its president, to provide an explanation for the use of "VETGEN" on the order form, but his statements as to what the president of the company

sales manager of Webcheck stating that the mailing was based on a purchased mailing list, and indicating his belief that the sending of the two letters to petitioner was the result of a typographical error.<sup>12</sup>

Exhibit P represents a telephone memo of a call Mr. Shaban received from a person identifying herself as Tina at Butler Co. She asked for information about "our" SCID test for horses, and Mr. Shaban told her "we" don't make SCID tests. She then asked if this was VetGen, and he said no, VetGenix.

This conversation does not indicate to us that the caller was confused about the source of respondent's services, or thought that petitioner did the genetic testing. Rather, it appears that she was trying to call respondent to order SCID tests from it, and reached VetGenix because she dialed the wrong number.

Exhibit Q represents a note by petitioner's president regarding a conversation he had with Butler. Specifically, he stated that he had a business dinner meeting with Butler Large Animal Representatives while in Utah, and was asked to

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ordering the product told him are hearsay and have not been considered.

<sup>12</sup> Petitioner has asserted that because the mailing list for this mailing contained listings for both VetGenix and Vetgen at the same address it reflects confusion on the part of the party compiling the mailing list. Again, even if there were confusion, and we consider this to be highly speculative, such confusion would not be relevant since mailing list providers are not the relevant customers for petitioner's veterinary products and respondent's genetic diagnostic services.

update them on SCID tests (which are done by respondent). The memo says "had me confused as being VetGen and not VetGenix." Again, we cannot conclude from this testimony and exhibit that the Butler representatives believed that petitioner was the source of the SCID tests, and therefore this is not evidence of actual confusion. Mr. Shaban's note at most reflects his belief that the Butler reps thought he was with VetGen, rather than with VetGenix.

Exhibit R represents a fax order which was sent to petitioner by The Butler Company. However, the fax cover sheet identifies the vendor as "VetGen," and the typed order form also identifies the vendor for the diagnostic test as "VET GEN," with an address in Ann Arbor Michigan, the city in which respondent is located. (Petitioner, on the other hand, is located in Florida.) Thus, this exhibit appears to represent merely a misdialed fax number, rather than a reflection that the Butler Company mistakenly believed that petitioner was the source of respondent's tests.

We have gone into some detail about these so-called incidents of actual confusion because evidence of actual confusion is a strong indicator of a likelihood of confusion. However, as Professor McCarthy points out:

evidence of actual confusion must be viewed in its evidentiary context. Confusion may not be causally related to the use of similar marks at all. For example, the courts have sometimes characterized evidence of actual

confusion as mere "secretarial carelessness caused by a failure to check business addresses," or due merely to "inattention and indifference," or that misdirected mail and phone calls are caused by "mere carelessness" of the post office or persons looking in the phone directory.

J. T. McCarthy, McCarthy on Trademarks and Unfair Competition, § 23.13, p. 23-41 © 1999, and cases cited therein. It appears to us that the incidents made of record by petitioner fall into the category of carelessness rather than a belief that petitioner was the source of respondent's testing services.

We would also point out that, although in general it is difficult and expensive to arrange to take testimony depositions of those who are allegedly confused, in this case the parties stipulated that testimony could be submitted in the form of declarations. We are surprised that petitioner did not avail itself of this procedure and submit the declarations of those people whom it asserts were confused, rather than simply relying on Mr. Shaban's recital of these incidents, since Mr. Shaban could not testify to what those people were in fact thinking.

Having considered all the evidence of record which is relevant to the duPont factors, we find that petitioner has failed to establish that respondent's mark VETGEN, for the services identified in its registration, is likely to cause

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confusion with petitioner's mark VetGenix for its registered goods.

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Decision: The petition for cancellation is denied.

E. J. Seeherman

E. W. Hanak

G. F. Rogers  
Administrative Trademark Judges  
Trademark Trial and Appeal Board